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15 POM WONDERFUL LLC

16
17 UNITED STATES DISTRICT COURT
18 CENTRAL DISTRICT OF CALIFORNIA
19

20 POM WONDERFUL LLC, a Delaware
21 limited liability company,

22 Plaintiff,

23 v.

24 THE COCA-COLA COMPANY, a
25 Delaware corporation; and DOES 1-10,
26 inclusive,

27 Defendants.

28 Case No. CV08-06237 SJO (JTLx)

29
30 **NOTICE OF SUBSEQUENT
31 AUTHORITY IN OPPOSITION TO
32 DEFENDANT'S MOTION TO
33 DISMISS PURSUANT TO FED. R.
34 CIV. P. 12(b)(6) OR, IN THE
35 ALTERNATIVE, REQUEST FOR
36 LEAVE TO LODGE SUBSEQUENT
37 AUTHORITY**

38 Judge: Hon. S. James Otero

39 Date: January 5, 2009

40 Time: 10:00 am

41 Room: 880

1 **TO THE COURT, ALL PARTIES AND THEIR ATTORNEYS OF**
 2 **RECORD:**

3 **PLEASE TAKE NOTICE** that plaintiff Pom Wonderful LLC (“Pom
 4 Wonderful”), through its undersigned counsel, hereby provides notice of a recent
 5 decision by the United States Court of Appeals for the Ninth Circuit that is material
 6 to the issues raised by Pom Wonderful in its opposition to The Coca-Cola
 7 Company’s (“Defendant’s”) Motion to Dismiss Pursuant to Federal Rule of Civil
 8 Procedure 12(b)(6) (the “Motion to Dismiss”). (Docket No. 11.)

9 Alternatively, should leave of Court be necessary to lodge this Ninth Circuit
 10 decision with the Court, Pom Wonderful respectfully requests that the Court enter
 11 an Order granting Pom Wonderful the required leave.

12 In support hereof, Pom Wonderful represents as follows:

13 1. On December 15, 2008, Pom Wonderful LLC filed and served its
 14 opposition to the Motion to Dismiss. (Docket No. 11.)

15 2. One week later, on December 22, 2008, the Ninth Circuit entered an
 16 Order Denying Petition for Rehearing En Banc and Amending Opinion and
 17 Amended Opinion (the “Order”) in a deceptive labeling case entitled Williams v.
 18 Gerber Prods. Co., Case No. 06-55921 (Dec. 22, 2008). A true and correct copy of
 19 the Order is attached hereto as Exhibit “A.”

20 3. In the Order, the Ninth Circuit declined to consider whether the
 21 plaintiffs’ state law unfair competition claims, based on allegations of deceptive
 22 fruit snack labeling, were preempted by the Federal Food Drug and Cosmetics Act
 23 (the “FDCA”). It reasoned: “[W]e decline to decide this issue in the first instance
 24 based on arguments made in an answering brief, particularly where nothing in
 25 Appellants’ complaint suggested that they were attempting to directly enforce
 26 violations of the FDCA.” (Ex. A., p. 16636.)

1 4. Instead, applying the “reasonable consumer” test, the Ninth Circuit
 2 considered whether an accurate side-panel ingredient list may insulate a fruit snack
 3 manufacturer from liability for otherwise “misleading representations on the front of
 4 the box.” (Ex. A., p. 16639.) It held:

5 The district court suggests that ‘no reasonable consumer upon review
 6 of the package as a whole would conclude that Snacks contains juice
 7 from actual and fruit-like substances displayed on the packaging
 8 particularly where the ingredients are specifically identified.’
 9 *Williams*, 439 F.Supp.2d at 1116. *We disagree with the district court*
 10 *that reasonable consumers should be expected to look beyond*
 11 *misleading representations on the front of the box to discover the truth*
 12 *from the ingredient list in small print on the side of the box.* The
 13 ingredient list on the side of the box appears to comply with FDA
 14 regulations and certainly serves some purpose. *We do not think that*
 15 *the FDA requires an ingredient list so that manufacturers can mislead*
 16 *consumers and then rely on the ingredient list to correct those*
 17 *misinterpretations and provide a shield for liability for the deception.*
 18 Instead, reasonable consumers expect that the ingredient list contains
 19 more detailed information about the product that confirms other
 20 representations on the packaging.

21 (Ex. A, p. 16639) (emphases added).

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1 Based on the foregoing, should leave of Court be necessary to lodge the Order
2 with the Court, Pom Wonderful respectfully requests that the Court grant the
3 required leave.

4 | Dated: December 29, 2008

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8 By:/s/ Mark D. Campbell
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1 ATTORNEYS FOR PLAINTIFF
2 POM WONDERFUL LLC

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